



**Testimony of Kristen Clarke
Co-Director, Political Participation Group
NAACP Legal Defense and Educational Fund, Inc.**

**Hearing on
Voter Registration: Assessing Current Problems
United States Senate Committee on Rules and Administration**

March 11, 2009

EXECUTIVE SUMMARY

The most recent 2008 presidential election was one of our most closely followed. The entire country was excited and engaged. Many local election officials were overwhelmed by the spikes in the number of submitted voter registration forms and countless scores of voters endured long lines throughout the primary and general election season. Yet, the final data indicates that only 61 percent of all Americans eligible to vote cast ballots in the November 2008 election -- 1% more than in the 2004 election. LDF believes that many more people would have liked to have voted in this historic election. And, we should undertake to see that in future elections they will have that opportunity.

During the 2008 presidential election cycle and the preceding period, we have witnessed a range of problems which illustrate that our voter registration system is broken and in need of repair. Among the problems observed include the development and implementation of purge programs that resulted in the removal of substantial numbers of voters from registration rolls; widely disparate practices among local election officials concerning the processing of voter registration applications; varied approaches towards the implementation of the Help America Vote Act's (HAVA) database matching requirements; confusion regarding the impact of felon disenfranchisement laws on voter eligibility; efforts to chill voter registration drives and outreach programs; and non-compliance with the mandates of the National Voter Registration Act at departments of motor vehicles and other designated state agencies. Together, these problems frustrate efforts to achieve full and equal participation in our political process. Indeed, new or re-emergent barriers to voter registration move the nation in the wrong direction.

Given these problems, the challenge we now face is determining how to reform and repair the system in a way that will be more inclusive and provide affirmative opportunities for broad and meaningful participation to the millions of eligible but not yet registered citizens throughout our country. While we turn our attention to exploring the corrective action that must be taken, we must remain mindful of the particular challenges faced by those who are among the most vulnerable and marginalized in our society — the poor, those incarcerated, and our nation's racial and ethnic minorities. Indeed, the future of American democracy remains tied to our ability to address the persisting barriers that exclude millions of citizens from being able to register and vote on Election Day.

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Chairman Charles E. Schumer and distinguished Members of the Committee, I am Kristen Clarke, Co-Director of the Political Participation Group of the NAACP Legal Defense and Educational Fund, Inc. (LDF). Founded under the direction of Thurgood Marshall, LDF is the nation's oldest civil rights law firm and has been very active in Congressional efforts regarding all of the major legislation affecting minority voting rights over the last several decades. Prior to joining LDF, I served for several years in the Civil Rights Division of the U.S. Department of Justice. Part of that time was spent as a Trial Attorney in the Voting Section of the Civil Rights Division. I am honored to have the opportunity to appear before you for this important hearing which seeks to identify ongoing challenges with respect to our nation's voter registration system.

Introduction

The most recent 2008 presidential election was one of our most closely followed. The entire country was excited and engaged. Many local election officials were overwhelmed by the spikes in the number of submitted voter registration forms and countless scores of voters endured long lines throughout the primary and general election season. Yet, the final data indicates that only 61 percent of all Americans eligible to vote cast ballots in the November 2008 election -- 1% more than in the 2004 election. LDF believes that many more people would have liked to have voted in this historic election. And, we should undertake to see that in future elections they will have that opportunity.

Significant evidence reveals that our voter registration system remains broken and in need of reform and repair. Approximately 213 million voting-age citizens were eligible to vote in the 2008 presidential election but only 186 million of them were registered to vote. Those figures mean that almost 13 percent of all eligible voters in our country remain excluded from participation in our political process. Many pre-election and Election Day voter complaints related to problems with voter registration. Around the country, voters turned out for early voting, sought to vote by absentee ballot or turned out to the polls on Election Day only to learn that their names did not appear on the registration rolls. Some of these individuals submitted registration forms that were never processed while others learned that their names were purged from the rolls. Beyond this category of would-be-voters are those who never had the opportunity to register because they lack access to prevailing registration methods, missed registration deadlines which vary by state, or have not been provided accurate information about their eligibility perhaps because of a felony conviction.

Working now to identify and address the problems that plague our voter registration system can help move us towards a more inclusive system and help us achieve a more robust democracy characterized by higher levels of participation among all eligible citizens. If we are to be regarded as the world's leading democracy, we must continue to study the problems and make affirmative efforts to ensure that we reach the millions of eligible citizens in our country who are not presently registered to vote.

Overview of the Problems Plaguing our Nation's Voter Registration System

During the 2008 presidential election cycle and the preceding period, we have witnessed a range of problems which illustrate that our voter registration system is broken and in need of repair. Among the problems observed include the development and implementation of purge programs that resulted in the removal of substantial numbers of voters from registration rolls; widely disparate practices among local election officials concerning the processing of voter registration applications; varied approaches towards the implementation of the Help America Vote Act's (HAVA) database matching requirements; confusion regarding the impact of felon disenfranchisement laws on voter eligibility; efforts to chill voter registration drives and outreach programs; and non-compliance with the mandates of the National Voter Registration Act at departments of motor vehicles and other designated state agencies. Together, these problems frustrate efforts to achieve full and equal participation in our political process. Indeed, new or re-emergent barriers to voter registration move the nation in the wrong direction.

Registration Barriers Faced by Persons with Criminal Convictions

Third party voter registration drives and voter education programs have long played an important role in reaching many eligible but not yet registered citizens. However, restrictions and bans on these efforts continue to be commonplace. Indeed, these efforts can help capture those eligible persons who may not have access to other more prevailing voter registration methods. On September 30, 2008, LDF filed a lawsuit on behalf of Reverend Kenneth Glasgow, a former offender who initiated a program aimed at identifying and registering eligible voters currently incarcerated in Alabama's correctional facilities.¹ On the eve of the close of registration for the 2008 election cycle, his voter outreach program was terminated by the Commissioner of the Alabama Department of Corrections.

While the Commissioner initially provided support for Reverend Glasgow's non-partisan voter registration effort, he rescinded access after succumbing to apparent political pressure. Glasgow's efforts were limited in scope and targeted at more than 6,000 inmates convicted only of simple drug possession crimes, offenses for which one does not lose his or her voting rights under Alabama's constitution and laws. Many of the individuals on the list were simply unaware of their eligibility to register to vote.

As we work to identify ways to capture the millions of eligible but not yet registered voters throughout the country, particular attention should be paid to widely varying state laws concerning the impact of a felony conviction on the right to vote. Many officials are unfamiliar with the laws concerning voting for persons with felony convictions which can unfairly exclude or deny otherwise eligible persons access to the ballot box. Programs such as Glasgow's play an important role in helping to resolve that confusion by specifically identifying and targeting eligible voters who currently sit on the margins of our political process.

¹ See Complaint, *Glasgow v. Allen, et al.* available at https://www.naacpldf.org/content/pdf/felon/glasgow_v_allen/complaint.pdf.

Challenges Faced by Homeless Persons and Other Transient Individuals

The National Coalition for the Homeless estimates that there are more than 744,000 homeless individuals throughout the country of whom only one-third are registered to vote. Most certainly, these numbers are likely to increase in the coming years as our country faces a foreclosure crisis of unprecedented proportions. Here, state laws vary on the requirements that must be satisfied by those homeless and other transient individuals seeking to register to vote. Some states require that individuals list a permanent address on the voter registration form and provide some form of identification while other states allow individuals to list the address of a local shelter or outreach center. During the 2008 presidential election cycle, LDF learned of a group of homeless individuals whose registration applications were rejected by a local Louisiana Registrar because their forms failed to identify a permanent address. The unique registration challenges faced by those without permanent addresses and by other transient individuals present additional barriers that must be eradicated in order to make our political process a more inclusive one.

Purge Programs

Throughout the 2008 election cycle and the period preceding it, a number of states have implemented questionable purge programs aimed at cancelling the registration status of voters. A 2007 purge program carried out in Louisiana provides one stark example. Here, the state implemented an interstate match and purge program that targeted voters presumed to be ineligible because they appeared on the registration rolls in more than one state. The state's cancellation program was based on a questionable methodology that looked to identify or "match" voters by comparing the first name, last name and date of birth of Louisiana voters with individuals on the registration rolls in a select number of states. Those individuals bearing the same first and last names, and same date of birth were presumed to be the same person and targeted for removal. However, this matching system proved unreliable capturing many voters who simply happened to have similar identifying information. Numerous studies reveal that these matching efforts are error-prone and unreliable in that they are not based on sufficiently unique criteria that would prevent the disenfranchisement of eligible voters.² Notably, the states that were the focus of this particular purge scheme were those in which many persons displaced by Hurricanes Katrina and Rita sought refuge following the storms.

In mid-August, 2007, approximately 12,000 voters were purged from the State's voter registration lists under this program and it remains unclear how many have been removed subsequent to that point. A significant number of those purged were African-American voters. Moreover, the apparent discretion and broad latitude given to election officials under this purge program³ not only undercuts the goals of the NVRA but also

² See e.g., Myrna Perez, *Voter Purges available at* http://brennan.3cdn.net/5de1bb5cbe2c40cb0c_s0m6bqskv.pdf

³ Illustrating the inherent unreliability of the program, Commissioner of Elections Angie LaPlace identified several scenarios that Registrars may encounter when dealing with "voters who appear to be matches" and

complicates efforts to move towards a more inclusive system. While some may argue that these voter removal programs are necessary to preserve the integrity of the voter rolls, poorly designed programs such as Louisiana's runs the risk of disqualifying large numbers of qualified registrants. In addition, these programs unfairly place the burden of re-registration squarely on impacted citizens and can thus, discourage individuals from future participation in the electoral process. For these reasons, voter removal programs should be carefully assessed and scrutinized to ensure that they are not over-inclusive with respect to the scope of persons targeted for removal.

Unreliable Database Matching Schemes

As states have moved to implement the Help America Vote Act's (HAVA) electronic voter registration database requirements, the resulting technological advancements have also been used to "match" and remove voters from registration lists. Over the past two years, LDF has identified a wide-spread pattern among states relying on flawed database matching schemes that result in the removal of voters from registration lists. Under these circumstances, states ignore the fail-safe provisions built into the National Voter Registration Act (NVRA) and use unreliable and flawed processes to identify and remove otherwise eligible voters. As a result, database match and purge procedures can be used to manipulate the composition of the electorate as elections approach.

Interstate match and removal programs can also have a negative impact when tied to the use of other electronic databases.⁴ Communities of color are particularly vulnerable when unreliable match processes are used to identify registered voters who share a name with an individual in an electronic database of criminal offenders. As exemplified by the purge program implemented in Florida shortly before the 2000 election, this type of cross-database, inter-state matching process has a particularly harmful impact on communities of color. Without judicial intervention or other action, the NVRA's failsafe requirements imposed upon list maintenance programs will continue to be circumvented by local jurisdictions. In this context, the inaccurate removal of registered voters will continue to negatively impact voters seeking to register and participate in the political process.

As these examples illustrate, current attacks on eligible voters occur both before and after registration. Both HAVA and the list maintenance provisions of the NVRA have provided opportunities for nefarious state and local actors to prevent the registration of eligible voters and opportunities for the removal of otherwise eligible voters from voter registration lists.

proposed an approach for dealing with persons who are registered in Louisiana and out of state but who want to cancel their out-of-state registration; and persons who are registered in Louisiana and indicate that they have never registered out of state, among others. In a June 2007 e-mail to Louisiana Voter Registrars, Commissioner LaPlace indicated, by way of example, that "Lisa A. Anderson" and "Lisa Pruitt Anderson" should be considered a match because with many female voters, "one registration may be under their middle name and one may be under their maiden name as their middle name."

⁴ See Complaint, *NAACP, et al. v. Harris, et al.* available at https://www.naacpldf.org/content/pdf/harris/NAACP-v-Harris_Complaint.pdf.

Mass Rejection of Voter Registration Applications for Immaterial Omissions

In 2008, LDF conducted a comprehensive pre-Election Day voter education and advocacy program: Prepared to Vote. Prepared to Vote was designed to provide critical information to voters well in advance of Election Day in order to ensure that more voters would be able to overcome obstacles and barriers that might otherwise stand in their way. An important component of the Prepared to Vote program focused on the rules, requirements and deadlines for voter registration. This section of my testimony provides an overview of some of the troubling trends we identified through our pre-Election Day advocacy efforts that reflected systemic problems with the voter registration system in a number of states.

Through our pre-Election Day outreach efforts, we observed a troubling trend in which local election officials rejected significant numbers of voter registration applications because of questionable interpretations of HAVA's requirements and non-material omissions on applications by those seeking to register. In particular, LDF learned that there are three circumstances in which local election officials frequently reject voter registration applications because of an immaterial omission: when registrants fail to mark a check box confirming that they are a citizen despite having signed an oath on the application which requires the applicant to affirm their citizenship, when registrants have been issued a driver's license number but provide their social security number instead; and when registrants inadvertently omit both their social security number and driver's license number from an application.⁵ In our view, each of these scenarios relies upon an erroneous interpretation of HAVA's requirements.

The failure to check a box regarding citizenship or age has resulted in the rejection of registration applications for immaterial omissions in a number of states. In Indiana, for instance, election officials were directed to reject registration applications if an applicant failed to mark the checkbox confirming their citizenship and voting age. Officials maintained this position notwithstanding other provisions of state law requiring that all Indiana voter registration applicants swear and affirm, under penalties of perjury, that they are of voting age and citizens of the United States. As Election Day approached, this interpretation led to successful litigation to prevent election officials from rejecting voter registration applications on these grounds.⁶ Although the parties resolved the litigation favorably by Election Day, the impact of this discretionary interpretation and application of HAVA's checkbox requirement continues. This example illustrates the impact of widely disparate interpretations and applications of federal law by local and state election officials.

⁵ Congressional intent regarding the use of social security and driver's license numbers to verify identity during the registration process has also led to significant confusion regarding HAVA's database match requirements. During the 2008 election cycle, Florida's process of rejecting all registration applications that did not match information maintained in a HAVA database led to the widespread rejection of registration applications statewide, ultimately leading to litigation. *See Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1156 (11th Cir. 2008).

⁶ *See Brown v. Rokita*, Civ. A. No. 1:08-CV-1484RLY-TAB (S.D. Ind.).

Moreover, local and state election officials are also interpreting HAVA's requirements in a manner that essentially imposes additional eligibility criteria that must be satisfied by individuals seeking to register to vote. On July 2, 2008, for instance, Alabama Secretary of State, Beth Chapman, distributed a memorandum to all local registrars outlining her interpretation of HAVA's requirements with respect to the verification of social security and driver's license numbers provided on registration applications. Chapman instructed local election officials to not accept or process a registration application unless the applicant provided their driver's license number or the last four digits of their social security number. The memorandum went on to assert that "applicants who have a driver's license *are required to provide that number*" by law (emphasis added). The varying interpretations of HAVA's requirements by local and state election officials certainly undermine Congress's intent to provide a more fair and open voter registration system.

Non-Compliance with the Registration Requirements of the NVRA

The NVRA requires that states make voter registration opportunities widely available at department of motor vehicles (DMVs) and other state agencies.⁷ Congress sought to mandate voter registration opportunities at public assistance offices to reach not only those citizens who drive, but also those citizens who are poor or disabled, and who do not drive but participate in public assistance programs.⁸ The NVRA requires entities that provide public assistance to integrate voter registration opportunities into the process during which an individual interacts with the agency (i.e., while the citizen seeks benefits or services.)⁹

Despite these NVRA requirements, recent evidence suggests that NVRA-designated agencies too often fail to implement training programs regarding the requirements of the NVRA; fail to carry out accurately their registration responsibilities and/or fail to submit (or timely submit) completed applications to the appropriate election official. For example, LDF has uncovered significant evidence of widespread non-compliance among several states including Louisiana and Mississippi, among others. Recent LDF investigations in these states reveal that personnel at a number of NVRA-mandated agencies are simply unfamiliar with the law and the obligation to make voter registration forms available to persons seeking services at these sites.

⁷ States are required to accept voter registration applications "made simultaneously with an application for a motor vehicle driver's license," 42 U.S.C. § 1973gg-2(a)(1), as well as applications submitted at the offices of other state agencies, 42 U.S.C. § 1973gg-2(a)(3).

⁸ See H.R. Conf. Rep. No. 66, 103d Cong., 1st Sess. 18-19 (1993).

⁹ See 42 U.S.C. § 1973gg-3, 1973gg-5(a), § 1973gg-5(a)(6).

Conclusion

The 2008 election cycle has yielded significant evidence of the ongoing problems that plague our nation's voter registration system. Given these problems, the challenge we now face is determining how to reform and repair the system in a way that will be more inclusive and provide affirmative opportunities for broad and meaningful participation to the millions of eligible but not yet registered citizens throughout our country. While we turn our attention to exploring the corrective action that must be taken, we must remain mindful of the particular challenges faced by those who are among the most vulnerable and marginalized in our society — the poor, those incarcerated, and our nation's racial and ethnic minorities. The future of American democracy remains tied to our ability to address the persisting barriers that exclude millions of citizens from being able to register and vote on Election Day.



KRISTEN CLARKE

Kristen Clarke is the Co-Director of the Political Participation Group at the NAACP Legal Defense and Educational Fund, Inc. where she oversees and coordinates the activities of the organization's legal program in the areas of voting rights and election law. She provided significant legal advocacy during Congress's 2006 reauthorization of the expiring provisions of the Voting Rights Act, helping to significantly shape and inform the Congressional record. Ms. Clarke has also provided testimony to Congress regarding election reform and voting rights issues.

She is currently defending the recently renewed Section 5 preclearance provision of the Voting Rights Act from a constitutional challenge in a case now pending before the United States Supreme Court.

Prior to joining LDF, Ms. Clarke worked for several years in the Civil Rights Division of the U.S. Department of Justice. She served as a trial attorney in the Voting Section of the Division where she handled a number of matters arising under the Voting Rights Act of 1965, among other federal statutes.

Ms. Clarke writes and comments frequently on issues concerning race, law and democracy. She received her A.B. from Harvard University and her J.D. from Columbia Law School.